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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 TRUNG DINH PHAN,)
09 Petitioner,) CASE NO. C11-1116-RSM-MAT
10 v.) (CR10-027-RSM)
11 UNITED STATES OF AMERICA,) ORDER STRIKING MOTION AND
12 Respondent.) GRANTING LEAVE TO REFILE
13 _____)

14 On July 21, 2011, respondent filed a Motion for Order Directing Waiver of
15 Attorney-Client Privilege. (Dkt. 6.). The motion is deficient in three ways: 1) it did not
16 include a noting date within the caption, 2) an incorrect noting date was placed on the electronic
17 docket, and 3) the Certificate of Service (Dkt. 6, at 5) is inadequate for service on an
18 incarcerated, *pro se* petitioner. The Court discusses in detail the deficiencies below.

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01 Local Rule CR 7(b)(1) states in pertinent part that:

02 All motions shall include in the caption (immediately below the title of the
03 motion) the date the motion is to be noted for consideration upon the court's
04 motion calendar. See CR 7(d) for scheduling motions and briefing deadlines.
The form for this notation shall be as follows:

05 NOTE ON MOTION CALENDAR: [insert date noted for consideration] . . .

06 The Court has reminded the U.S. Attorney's Office in previous cases that this provision is
07 especially important in cases involving incarcerated *pro se* plaintiffs/petitioners, who do not
08 have access to the electronic filing system (CM/ECF) and thus do not receive notification of the
09 noting date. The only notification that a *pro se* prisoner receives is via the caption. Given the
10 omission of a noting date in the caption, petitioner cannot receive proper notification of the
11 noting date.

12 Respondent also placed an incorrect noting date on the Court's electronic calendar,
13 noting this motion for two Fridays after filing, instead of three. The final sentence of
14 CR 7(d)(2) directs that:

15 All motions filed in a case in which a party is under civil or criminal
16 confinement shall be subject to the briefing schedule under Rule 7(d)(1) or
7(d)(3), not this subsection.

17 In this instance, since the motion is not stipulated and the petitioner is incarcerated, it must be
18 noted pursuant to CR 7(d)(3), which requires a noting date of three Fridays after filing, not two.

19 Finally, the Certificate of Service attached to this motion states as follows:

20 I hereby certify that on July 21, 2011, I electronically filed the foregoing with
21 the Clerk of the Court using the CM/ECF system which will send notification of
22 such filing to the attorney(s) of record for the defendant(s). *I hereby certify that I
have served the attorney(s) of record for the defendant(s) that are non CM/ECF
participants via telefax.*

01 (Dkt. 6, at 5 (emphasis added).) Until penal institutions permit service via fax or electronic
02 means, the only reliable means of serving an unrepresented prisoner is via U.S. Mail.

03 The Court STRIKES respondent's motion and grants respondent leave to REFILE a
04 corrected motion within seven (7) days of the date of this Order. Given the motion's subject
05 matter, the Court will also entertain, if necessary, the government's properly supported motion
06 for a limited extension of time to file an answer to the petitioner's 28 U.S.C. § 2255 motion.

07 DATED this 25th day of July, 2011.

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10 Mary Alice Theiler
11 United States Magistrate Judge
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